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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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11 JAMES H. FISHER,

No. 2:05-cv-0540-MCE-PAN-P

12 Plaintiff,

13 v.

ORDER

14 N. DIZON, ET AL.,

15 Defendants.  
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17 Plaintiff, a state prisoner proceeding pro se, has filed  
18 this civil rights action seeking relief under 42 U.S.C. § 1983.  
19 The matter was referred to a United States Magistrate Judge  
20 pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No.  
21 262.

22 On May 17, 2006, the magistrate judge filed Findings and  
23 Recommendations herein which were served on all parties and which  
24 contained notice to all parties that any objections to the  
25 Findings and Recommendations were to be filed within twenty (20)  
26 days.

1 Plaintiff has filed Objections to the Findings and  
2 Recommendations.

3 In accordance with the provisions of 28 U.S.C.  
4 § 636(b)(1)(C) and Local Rule 72-304, this Court has conducted a  
5 de novo review of this case. Having carefully reviewed the  
6 entire file, the Court finds the Findings and Recommendations to  
7 be supported by the record and by proper analysis.

8 Accordingly, IT IS HEREBY ORDERED that:

9 1. The Findings and Recommendations filed May 17, 2006, are  
10 adopted in full; and

11 2. Defendants' November 10, 2005, Motion to Dismiss is  
12 granted in part and denied in part as follows:

13 a. Defendants' Motion to Dismiss for failure to  
14 exhaust available administrative remedies Plaintiff's claim that  
15 Defendants Mendoza, Rosales and Swan<sup>1</sup> participated in the  
16 repeated harassment of Plaintiff and the March 14, 2004, beating  
17 of Plaintiff is denied;

18 b. Defendant Dizon's Motion to Dismiss the claim that  
19 he violated the Eighth Amendment by subjecting Plaintiff to  
20 repeated night-time harassment, including poking Plaintiff in the  
21 buttocks, is denied;

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25 <sup>1</sup> Defendant Swan was incorrectly referred to as defendant  
26 "Swain." (Objections at 3.)

1 c. The Motion to Dismiss by Defendants Annunciacion,  
2 Barrientos, Mendoza, Rosales and Swan on the ground Plaintiff  
3 fails to state a claim they used excessive force against  
4 Plaintiff in violation of the Eighth Amendment is denied;

5 d. The Motion to Dismiss by Defendants Cry, Grannis,  
6 Newsome, Pearson, St. Germain, Schwartz, Summer and Yarber on the  
7 ground Plaintiff fails to state a claim they used excessive force  
8 against Plaintiff in violation of the Eighth Amendment is  
9 granted;

10 e. The Motion to Dismiss by Defendants Dizon,  
11 Annunciacion, Barrientos, Mendoza, Rosales, Swan, Yarber, Sumner,  
12 Powers, Newsome, Cry, St. Germain, Pearson, Veal, Grannis and  
13 Schwartz upon the ground Plaintiff fails to state a claim they  
14 conspired to harass, torment and terrorize Plaintiff is granted;

15 f. The Motion to Dismiss by all Defendants upon the  
16 ground Plaintiff fails to state a claim for damages against them  
17 in their official capacities is granted;

18 g. The Motion to Dismiss by all Defendants upon the  
19 ground that insofar as Plaintiff seeks relief pursuant to Title  
20 II of the ADA, Plaintiff fails to state a claim is granted.

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1        3. Defendant Swan shall file an answer to the excessive  
2 force claim in Plaintiff's Complaint within ten (10) days from  
3 the date of this Order.<sup>2</sup>

4        DATED: July 17, 2006

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7 MORRISON C. ENGLAND, JR.  
8 UNITED STATES DISTRICT JUDGE  
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25        <sup>2</sup> Defendants Annunciacion, Barrientos, Dizon, Mendoza,  
26 Powers, and Rosales filed an Answer to the Complaint on July 5,  
2006.